TAHANSAN SDN. BHD.

v.

TAY BOK CHOON

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS LP
WAN SULEIMAN FJ
GEORGE SEAH FJ
[CIVIL APPEAL NO. 55 OF 1983]
17 SEPTEMBER 1984

COMPANY LAW: *Winding up petition - Order or mere affidavit evidence - Whether grounds justifying an order for dissolution of partnership would justify winding up - Removal of respondent from directorship - Whether unjustified exclusion from partnership business - Management participation - Whether association must be dissolved, if broken - Special underlying obligation - Denial of its existence.*

This is an appeal from an order of the High Court made on 25 February 1983 that the appellant company be wound up.

The original subscribers to and first directors of the company were Tee Ah Kow (Tee), Mak Boon Seng (Mak), Chew Kee Hui (Chew) and Ker Kim Tim (Ker). Mak and Tee promised to appoint the respondent as Chairman of the Board of Directors of the company, if he agreed to purchase Chew's shares. The respondent bought Chew's RM25,000 shares and subsequently he and his son Tay Hock Yam (Tay) were appointed directors at a meeting of the Board of Directors of the company on 29 February 1980.

The respondent had lent RM25,000 to Tee and RM16,000 to Mak. There was a dispute as to the nature of the loans. The respondent claimed that the loans were to help Tee and Mak purchase additional allotment of 25,000 shares. But Tee and Mak claimed they were "friendly loans".

By a meeting of the Board of Directors of the company held on 22 & 27 November 1981 the respondent and his son Tay were removed from the Board of Directors. Between 27 November 1981 and 25 February 1983 (date of winding up order) the respondent and Tay were not represented in the management of the company and they were not called even for the 4th AGM held on 5 August 1982.

The respondent filed a petition for a winding up order for the reasons that he had joined the company as a shareholder on the basis that he and his son would be given an equal share in the management of the business and that the other shareholders would not use their majority to outvote him on major issues. The learned trial Judge found that a partnership existed between the respondent and the other three and held that any ground which would justify an order for the dissolution of a partnership would justify the winding up of the company. He held that the removal of the petitioner from his directorship was an unjustified exclusion of him from the partnership business and therefore ordered for winding up.

Held:

[1] The reasons given by the trial Judge for agreeing with what the respondent alleged was not at all clear. He should have indicated to the parties that he is making an order on mere affidavit evidence and given them an opportunity to reach an agreement among themselves.

[2] The winding up order is a drastic remedy.

[Appeal allowed with costs. Liquidation costs order postponed.]

Cases referred to:
In re Lundie Brothers Ltd. [1965] 2 AER 692
Ebrahimi v. Westbourne Galleries Ltd. [1973] AC 160
Eng Mee Yong v. V. Letchumanan [1979] 2 MLJ 212
In re ABC Coupler and Engineering Co. Ltd [1962] 1 WLR 1236
Re Wondoflex Textiles Pty. Ltd. [1951] VLR 458
Re Straw Products [1942] VLR 139
Metropolitan Fuel Pty. Ltd [1969] VR 328

Legislation referred to:
Companies Act 1965 ss. 218(1)(i), 289(1), 221(2)(c)
Companies (Winding-up) Rules 1972, rr. 26, 30
Rules of the High Court 1980, O. 3 r. 2(3), O. 38 r. 2(3)

For the appellant - P. Royan (Ker with him); M/s. Baharuddin, Bernatt, Tan & Ker
For the respondent - T. Thomas; M/s. Skrine & Co.

JUDGMENT

Wan Suleiman FJ:

This is an appeal from an order of the High Court made on 25 February 1983 that the appellant company be wound up.

The appellant company was incorporated on 7 November 1977 under the Companies Act, 1965 as a private company limited by shares.

The nominal capital of the company was RM400,000 divided into 400,000 shares of RM1 each. The amount of the capital paid up or credited as paid up was RM200,000.

The original subscribers to and first directors of the company were Tee Ah Kow ("Tee"), Mak Boon Seng ("Mak"), Chew Kee Hui ("Chew") and Ker Kim Tim @ Kerk Choo Ting ("Ker").

The company at all material times carried on *inter alia* the business of manufacture and sale of window louvres at its factory situated at 82, Jalan Kilang Midah, Taman Midah, Jalan Cheras, Kuala Lumpur.

Tee is a distant relative of Tay Bok Choon. Prior to 15 February 1980 Tee Mak, Chew and Ker held 25,000 shares each in the company.

Tee took the initiative to get to know the respondent and approached the respondent to purchase Chew's 25,000 shares.

Mak and Tee promised to appoint the respondent as the chairman of the board of directors of the company if he agreed to purchase Chew's shares, and was duly made a chairman.

The respondent bought Chew's 25,000 shares on or about 29 February 1980.

After the respondent became a shareholder he, on behalf of the company, approached Balfour Williamson (S) Pte. Ltd. ("Balfour") for financial assistance to the company.

At a meeting of the board of directors of the company on 29 February 1980 it was resolved that:

(i) Chew's sale of 25,000 shares to the respondent be approved.

(ii) Chew should resign as director.

(iii) The respondent and his son Tay Hock Yam ("Tay") be appointed directors.

(iv) The allotment of 100,000 shares at RM1 each to Tee, Mak, Ker and the respondent in equal proportion.

(v) All cheques issued by company to be signed by Mak and counter-signed by 2 of the other directors.

Hence as at 29 February 1980 Tee, Mak, Ker and the respondent held 50,000 shares in the company. Together with Tay they formed the board of directors of the company.

After the respondent became a shareholder Balfour extended credit facilities to the company.

The respondent lent RM25,000 to Tee and RM16,000 to Mak. Mak has returned RM1,500 leaving a balance of RM14,500 unpaid. What is in dispute is the nature of the loans. The respondent claims that the loans were to help Tee and Mak purchase the additional allotment of 25,000 shares which were issued to all the shareholders in February 1980. Tee and Mak claim that they were "friendly loans."

At a meeting of the board of directors of the company on 1 June 1980 it was resolved that Tee, Mak and Tay be appointed executive (working) directors and that they be authorised to purchase machinery and equipment for the company. It was further resolved that Mak be paid RM1,200 per month and Tee and Tay RM900 per month.

At a meeting of the board of directors of the company on 30 June 1981 it was resolved that:

(i) the company approve the transfer of 10,000 shares each from Tee, Mak Ker and the Respondent to Tay.

(ii) Tee retire as chairman of the board of directors and the respondent be appointed in his place.

(iii) the monthly salaries of Tee, Mak and Tay be increased to RM1,500 per month with effect from 11 June 1981.

At the meetings of the board of directors of the company held on 26 July 1981 and 11 August 1981 it was proposed and resolved that the board of directors' resolution of 30 June 1981 be revoked.

The alleged reason given by the company for revoking the previous resolution was the condition imposed by the Ministry of Trade and Industry relating to the nationality of the company's shareholders on the manufacturing licence granted to the company to manufacture sewing machine studs and pressed metal parts on a jobbing basis at a proposed factory in Bangi.

The respondent and Tay, through their solicitors, suggested that the difficulty over nationality of the shareholders referred to above could be removed by transferring the shares in question to Dr. Tan Tiong Hong, a Malaysian citizen. No response has been received todate to this suggestion.

this time (August 1981) the shareholders and directors of the company were divided into 2 factions. One faction comprised Tee, Mak and Ker ("the original shareholders"). The other consisted of the respondent and his son, Tay. On both fronts, i.e. at meeting of shareholders and at meetings of directors the faction comprising the original shareholders by virtue of their superior voting power would and did get their way.

The original shareholders, respondent alleged, further acted to take complete control of the management of the company by dismissing 2 clerks, a production executive and a storeman. In their place Ker's sister-in-law and other employees were employed. Mrs. Ker began to play an active role in the affairs of the company and visited the factory frequently. The respondent and Tay were not consulted in respect of these developments.

At a meeting of the board of directors held on 23 September 1981 Mak was appointed managing director of the company and all "the executive powers of all the other directors" were terminated with immediate effect. It was further resolved that Mak be empowered to employ and dismiss all employees and to authorise the purchase and sale of all the company's products. In effect it meant Mak assumed all the powers of the board and became the supreme head of the company. Thus from 23 September 1981 Tay ceased to be an employee of the company.

At a meeting of the board of directors of the company held on 22 November 1981 and 27 November 1981 it was resolved that Ker, the respondent and Tay be removed from the board of directors. The resolution was carried by 3 to 1 with Tee, Mak and Ker voting for the resolution and the respondent voting against. Thus the respondent and Tay were excluded from the board of directors with effect from 27 November 1981.

Between 27 November 1981 and 25 February 1983 (date of winding-up order) the respondent and Tay were not represented in the management of the company.

Prior to 1980 the company did not pay any dividends on its shares.

The company paid out dividends for the first time in September 1982. This was after the winding-up petition was presented. The respondent accepted his dividends (RM9,000) on a without prejudice basis.

After the respondent and Tay were excluded from management the company at its 4th annual general meeting held on 5 August 1982 resolved to increase the remuneration of the 2 directors, Tee and Mak, from RM1,500 per month to RM2,500 per month. The respondent and Tay did not receive the requisite notice calling the said meeting on 5 August 1982 and accordingly did not attend.

The foundation of respondent's petition for a winding up order, Mr. Royan stressed was that he had joined the company as a shareholder on the basis that he and his son would be given an equal share in the management of the business and that the other shareholders would not use their majority to outvote him on major issues.

The learned trial Judge agreed with the respondent. He found that in substance a partnership existed between respondent and the other three, and following In *re Lundie Brothers Ltd.* [1965] 2 AER 692, held that any ground which would justify an order for the dissolution of a partnership would justify the winding-up of this company. His Lordship cited extensively and with approval passages from Eb*rahimi v. Westbourne Galleries Ltd. [*1973] AC 160 and said:

> Just as in the present case, the petitioner was removed from his directorship under a power valid in law. But the respondents did do him a wrong by excluding him from participation in the conduct of the business upon which they have embarked on the basis that all should participate in the management. In my judgment, I have come to the conclusion that I ought to make an order for winding-up. The removal of the petitioner from his directorship was an unjustified exclusion of him from the partnership business.
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> An order for winding-up on just and equitable grounds was, in*ter alia, ma*de under s. 218(1)(i) of the Companies Act.

The law of companies recognises the right in many ways to remove a director from a board. We agree with Mr. Royan that generally a director cannot complain if he is removed from the board or not relisted after having retired by rotation so long as it is in accordance with the Articles of Association and/or the Companies Act, but in the words of Lord Wilberforce in Eb*rahimi's ca*se (at p. 380):

> The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved.

The appellant says that such underlying obligation has not been pointed to and proved. Tee Ah Kow had specifically denied these allegations in paras. 9, 10 and 27 of his affidavit dated 6 July 1982. This and the subsequent affidavits of the parties show that there was a real dispute as to a whether or not any assurances were given to the petitioner/respondent before he formed the company.

In the face of the denial that this agreement was ever made, it was submitted that the trial Judge was in no position at all to come to a finding of fact without taking oral evidence which could be tested by cross-examination.

Whilst the rr. 26 and 30 of the Companies (Winding-up) Rules 1972 specifies that a winding-up petition shall be verified by affidavit, the Courts can under O. 3 r. 2(3) of the Rules of the High Court, 1980 order attendance for cross-examination of persons making such affidavit, and s. 221(2)(c) of the Companies Act empowers it at the instance of either party to direct the taking of oral evidence.

In E*ng Mee Yong v. V. Letchumanan, a* decision of the Privy Council reported in [1979] 2 MLJ 212 at p. 216 appears this passage:

> Their Lordships must therefore turn to the evidence that was before the High Court on the hearing of the application, bearing in mind that if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only. It leaves a serious question to be tried.
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> Mr. Royan claim that because there is nothing vague, equivocal, self-contradictory or implausible about the denial by Tee of the alleged agreement, then affidavit evidence alone would be insufficient.

In r*e ABC Coupler and Engineering Co. Ltd [*1962] 1 WLR 1236 was cited as another authority for the proposition that in cases of this sort the Court should require the petitioner to substantiate his case more fully by calling for oral evidence. At p. 1243 Buckley J said:

> ... where grave charges are levelled against individuals in a winding-up petition, or it may be, where the case is one of complexity turning upon the conduct of persons in a company, the Court will not in the exercise of its discretionary jurisdiction, be satisfied with mere p*rima facie ev*idence as the statutory affidavit affords, but will require the petitioner to make out his case more fully.

Without going into detail we agree with Mr. Royan that the reasons given by the trial Judge for agreeing with what the petitioner/respondent alleged on this issue is not at all clear.

We need only mention one of the four reasons mentioned by Mr. Royan, to support his contention that had the trial Judge given the affidavits a more thorough scrutiny he could not have concluded that the agreement alleged by the petitioner/respondent was ever made.

At the EGM of 22 November 1981 a resolution was passed to remove the respondent and his son as directors, but no protest was made then that they should not be removed because of the alleged agreement. Moreover, a solicitor held proxy for him, and the solicitor wrote several letters before the petition was filed, and yet again, not a word about the agreement. The inescapable inference is that there was no such agreement.

Mr. Thomas suggests that the fact appellant was represented by Counsel in the Court below and yet made no application to examine the deponents should be held against him.

Order 38 r. 2(3) of the RHC empowers the Court to examine the deponents regardless of the absence of such application and we agree that in this instance it should have done so.

The winding-up order is without doubt a drastic remedy, a sledgehammer remedy and we would agree with Mr. Royan that even if the trial Judge had been right in his decision to make an order (which we are satisfied he is not) on mere affidavit evidence, he should have so indicated to the parties and given them an opportunity to reach an agreement among themselves as was done in *Re Wondoflex Textiles Pty. Ltd*. [1951] VLR 458 and *Re Straw Products* [1942] VLR 139, and also ascertain the wishes of creditors and contributories in accordance with s. 289(1), as was done in *Metropolitan Fuel Pty. Ltd.* [1969] VR 328.

We would therefore allow the appeal with costs here and below, and order the deposit to be returned to appellant. We would also postpone making any order regarding the liquidation costs.

Also found at [1984] 2 CLJ 224